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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 156

MORROW RADIO MANUFACTURING CO., a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATUTES:

Internal Revenue Code of 1954:

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Sec. 4142 .....2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15

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RULINGS:

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Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner named above prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on February 13, 1961.

OPINIONS BELOW

The opinion of the district court (R. 19-22) is reported at 179 F. Supp. 436. The opinion of the court of appeals (Appendix A, pp. A1-A9, *infra*) is reported at 287 F. 2d 502.

JURISDICTION

The judgment of the court of appeals (Appendix B, p. A10, *infra*) was entered on February 13, 1961. A timely petition for rehearing was filed on March 13, 1961, (R., Vol. II, p. 11-A)[1] and was denied on March 20, 1961 (Appendix C, pp. A10-A11, *infra*). A motion for leave to file a further petition for rehearing was filed on March 25, 1961, and was denied on March 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

This is a civil action, arising under acts of Congress providing for the internal revenue, of which the United States District Court has original jurisdiction under 28 U.S.C. § 1340.

QUESTIONS PRESENTED

1. Whether the court of appeals can require the taxpayer to pay the manufacturers excise tax upon the sale of items of radio equipment, some of which were not specified by Congress in section 4142 of the Internal Revenue Code of 1954 as being subject to the tax imposed under section 4141, without delineating why the articles are regarded as taxable, without construing crucial provisions of the statute, without defining necessary terms, and without giving effect to the administrative interpretation of Treasury Regulations and rulings of the Internal Revenue Service.

2. Whether the receivers, fixed-tuned receivers, power supply units, and converters manufactured and sold

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[1] In forwarding the record in the court of appeals, the Clerk has designated the entire Petition of Appellant for Rehearing as page 11-A of his certified transcript, which is designated as Vol. II of the record.

by taxpayer were radio components, within the meaning of section 4142 of the Internal Revenue Code of 1954, so as to be subject to the manufacturers excise tax imposed under section 4141 upon their sale. This question, in turn, depends upon whether or not these items are specifically named in section 4142 and, if so, whether they are individually in fact suitable for use on or in connection with, or as component parts of any of the articles enumerated in section 4141, *i.e.*, radio receiving sets as applicable herein.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are sections 4141 and 4142 of the Internal Revenue Code of 1954, as amended. The regulations involved are Treasury Regulations on Manufacturers Excise Taxes (1954 Code), Sec. 40.4141-1 and 40.4142-1. These are set forth in Appendix D, pp. A11-A17, *infra*.

STATEMENT

The petitioner, an Oregon corporation (herein referred to as "taxpayer"), during the period October 1, 1955 through September 30, 1958, was engaged in the manufacture and sale of various articles of radio equipment, among which were items designated and commonly known in the trade as receivers, fixed-tuned receivers, converters, power supply units, and speakers. Each of these articles was manufactured and sold as a separate unit in a separate cabinet, primarily as amateur or "ham" radio equipment (R. 23-25).

The individual articles in question did not constitute complete radio receiving sets, and they were not sold by the taxpayer in groups which, taken together, would

constitute a complete operable assembly. They were sold separately. They were not of the entertainment type. (R. 28, 131-138) There was no evidence that any one of these articles was used by the taxpayer in the manufacture and sale of a complete radio receiving set. Likewise, there was no evidence that any of these articles was used by, or was of the type used by, any other person in the manufacture and sale of a complete radio receiving set, taxable under section 4141 of the Internal Revenue Code of 1954.

The Government assessed manufacturers excise tax against the taxpayer on sales of this equipment made during the period of October 1, 1955, through September 30, 1958. A portion of the amount assessed was paid by the taxpayer and claims for refund were timely filed. These were rejected by the Government. The taxpayer then filed a timely suit for refund in the District Court for the District of Oregon. The Government counterclaimed for the amount of the assessment not previously paid by the taxpayer (R. 12-14).

In its suit for refund of the excise tax paid, the taxpayer contended in the district court that none of the articles manufactured and sold by it during the period in question was subject to the manufacturers excise tax imposed by section 4141 of the Internal Revenue Code of 1954, that none was of the "entertainment type," and that none was a "radio component" as defined by section 4142 of the Internal Revenue Code of 1954. This was tantamount to contending that, if the articles should be considered to be radio receiving sets within the meaning of section 4141, they should not be subject to the tax because they were not of the "entertainment type," the only type subject to tax during the period in question. It was also a direct

contention that the articles were not subject to the tax because they were not radio components. The Government contended that the articles in question "are either of the 'entertainment type' or are 'radio components'." (R. 14-15)

The district court held that the articles were not of the "entertainment type" but did hold for the Government that each of the articles involved was a radio component, manufactured and sold as such (R. 28). Judgment was entered by the district court against the taxpayer and in favor of the Government on its counterclaim for unpaid taxes and interest (R. 30-31).

The taxpayer then appealed to the court below (R. 32). That court affirmed, holding that "the trial judge was correct in holding that Morrow was a manufacturer of components within the meaning of §§ 4141 and 4142."[2] That court also held that it did not feel "that an examination of" the statute "supports the position that Morrow advances." That court made no attempt to show the interrelationship between the two sections of the statute and their relationship to the Treasury regulations and administrative rulings, and to correlate these with the actual facts of the case. (Appendix A, pp. A5-A6, *infra*.)

After the decision of the court of appeals was handed down, the taxpayer filed a petition for rehearing on March 13, 1961, in an attempt to point out to that court some basic misconceptions and errors in its interpretation and application of a rather technical and complex section of the law (R., Vol. II, p. 11-A; f. n. 1, *supra*). This petition for rehearing was promptly denied on March 20, 1961 (Appendix C, pp. A10-A11, *infra*).

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[2] It should be noted that the tax is placed upon the sale, not the manufacture.

REASONS FOR GRANTING THE WRIT

Review should be granted by this Court because the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The tax here brought into question is a manufacturers excise tax, imposed upon the sale by a manufacturer, producer, or importer of certain specified articles. It should be noted at the outset that this tax is not a general franchise tax, imposed upon manufacturers generally or upon manufacturers within a certain industry. It is a tax imposed only upon the sale of articles specifically selected and enumerated by the Congress in the statute. Items not named in the statute are not subject to the tax, even though they may be related to or within the same general field of manufacture as those items which are.

The basic question presented is whether the items manufactured and sold by the taxpayer were "radio components," as defined in section 4142, so as to be subject to the tax imposed by section 4141 upon the sale of "radio and television components" by manufacturers.

Whether or not an article is a radio component depends upon two factors: (1) it must be specifically named in section 4142; and (2) if named, it must be suitable for use on or in connection with, or as a component part of one of the articles enumerated in section 4141. The articles enumerated in section 4141 are: radio receiving sets, television receiving sets, phonographs, etc.

Since nothing is taxable as a radio component unless it is suitable for use with an article named in section 4141, it is imperative that the meaning of the term "suitable for use" be correctly interpreted and applied. The Treasury Department in its Regulations on Manufacturers Excise Taxes, Sec. 40.4142-1 (b), has defined this term to mean items that "are commonly used with any of the articles enumerated in section 4141 and paragraph (a) (1) through (6) of § 40.4141-1" (of the regulations) or which "possess actual, practical commercial fitness for such use." (Appendix D, p. A16, *infra*).

No less important to determination of this issue is the correct understanding of what is meant by a "radio receiving set," the item enumerated in, and subject to tax upon its manufacture and sale under section 4141. Although this item has been subject to the manufacturers excise tax since 1941 (Revenue Act of 1941, c. 412, 55 Stat. 687), a period of twenty years, the Treasury Department has never seen fit to issue a definition of it in regulations promulgated in this general area. It has, however, been defined in Revenue Ruling 56-388, 1956-2 Cum. Bull. 808 (Appendix E, pp. A17-A19, *infra*) as part of the definition of "manufacturer."

The court below, completely eschewed any aid from the Treasury Regulations and Revenue Ruling in its determination that the articles manufactured and sold by the taxpayer were subject to tax.

Of the four articles in question, only one, the power supply unit, is specifically named in section 4142.[3]

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[3] Speakers sold during the period in question were admitted by the taxpayer to be subject to the tax (R. 28).

First. The court below has ruled upon an important question of federal tax law without giving the taxpayer the benefit of the application of the official Treasury Regulations on two points: (1) as to why three items (receivers, fixed-tuned receivers, and converters) were held subject to the tax as though they had been named in the statute, and (2) as to the meaning and interpretation of the key phrase "suitable for use." The taxpayer was likewise deprived of the benefit of a pertinent revenue ruling, *supra*, giving the administrative interpretation of what constitutes a "radio receiving set."

In its opinion, the court below does not even mention the pertinent Treasury Regulations, much less discuss their applicability to the factual situation and as to whether the items in question were "commonly used" or "had actual, practical commercial fitness for use" with a radio receiving set. It makes no definitive ruling in its opinion as to what the statute means by the term "radio receiving set" with which an article is required to be "suitable for use" before being classed as a radio component subject to tax, even though it completely ignores the administrative ruling on this subject. No effort at all is made to explain why three items not even named in the statute are held subject to the tax.

The promulgation of regulations and rulings for the interpretation and administration of the tax laws by the Commissioner of Internal Revenue and Secretary of the Treasury is not only sanctioned by statute but is, also, a practice which has been recognized fully by this Court from earliest times. This principle is so well known as not to require the citation of any authority.

Indeed, it is difficult to find a tax case in which the regulations do not play a prominent part.

An opinion of a court of appeals, which ignores such basic criteria for judging the applicability of the tax laws, should not be allowed to stand unreviewed by this Court. If the court of appeals chose to ignore the regulations and rulings and to interpret the statute under its own standards, then it should have explained in some detail why three items, not named in the statute, were held subject to the tax, way all of the items under consideration were considered "suitable for use," and what it considered to be a radio receiving set within the meaning of section 4141. This, it failed to do.

Review and correction of an erroneous decision of a court of appeals is especially important in cases involving federal excise taxes. Because of the small number of such cases that reach the level of that court or this Court, an erroneous decision could stand for many years and cause untold hardship by being employed as a precedent by the tax collecting authorities. In our search for a conflict of decisions on the precise point involved here, we found no other decided case under these sections, even though the tax in question has been in effect for nearly thirty years (Revenue Act of 1932, c. 209, 47 Stat. 169).

Importance to Industry. There are a great number of manufacturers in this country engaged in the production and sale of items listed in section 4142. A report on hearings before a subcommittee of the House Committee on Ways and Means in 1956 showed revenue of $17 million annually from the tax paid on radio and television components. This would indicate sales of

$170 million per year, inasmuch as the tax is 10 percent of the selling price of each of the articles. The industry possibly affected is larger than this, however, as there are many articles named in section 4142 which are now manufactured and sold free of tax because they are not considered suitable for use with articles named in section 4141. An ill-conceived decision such as the present one, which pays virtually no attention to the prime requisite of taxability—"suitable for use"—and makes no attempt to understand its several facets and to apply it correctly, could conceivably change this picture to a marked degree.

Importance to individual taxpayers. The tax imposed upon the sale of radio and television components is 10 percent of the price for which the article is sold. This means a payment to the Government of 10 percent on *gross sales.* And the tax is imposed upon the manufacturer; it is not collected by him from his customer as are some taxes which are imposed upon the purchaser. Of course, those manufacturers who are clearly subject to the tax pass it on to their customers at the time of sale. The horror to the individual taxpayer lies in the fact that the Government may, under such a decision as this, go back for a number of years and assess tax upon the sale of items which, at the time of sale, were not thought to be taxable. Since it is doubted that there are many businesses that have a net income of 10 percent on gross sales, little imagination is required to visualize the financial ruin implicit in the assessment of tax at this rate for a period of several past years.

Second. The present problem of whether the sale of articles by a manufacturer is subject to the manufacturers excise tax imposed by section 4141 is

a recurring one. It is important to the proper administration of the Internal Revenue laws that the Supreme Court settle the law in this vital area of federal taxation. This Court should determine and clearly decide what the Congress meant by making the taxability of articles named in section 4142 subject to their being suitable for use with radio receiving sets or other articles enumerated in section 4141.

The Treasury Regulations (Appendix D, p. A16, *infra*) state that articles are considered "suitable for use" if they are "commonly used with" or "possess actual, practical commercial fitness for use" with articles named in section 4141. For all of the nearly thirty years that a similar provision has been in the tax law, the Treasury Department has failed to include in its regulations a definition of radio receiving sets, etc., although as pointed out, *supra*, it has indirectly given a definition in Rev. Rul. 56-388, 1956-2 Cum. Bull. 808 (Appendix E, pp. A17-A19, *infra*). The court below skirts the issue by changing the frame of reference to state that it finds no intent on the part of Congress to redefine taxable components to mean only those that may be used as parts of radio sets that are contained in a single cabinet. This still does not answer the question as to the nature of the article that an item must be suitable for use with, in order to be designated a radio or television component under section 4142 and taxed under section 4141.

It seems clear that the radio receiving sets with which articles must be suitable for use in order to be classified as radio components must be those subject to tax under section 4141 and that these are radio receiving sets manufactured and sold as single, complete operating units. The sets referred to in section 4141 are

radio receiving sets manufactured and sold by a manufacturer of radio receiving sets for sale. That it is usual commercial practice for such radio receiving sets to be contained in one cabinet is a matter of such common knowledge as to be readily subject to judicial notice as a part of "the general customs and usages of merchants" (*Brown* v. *Piper*, 91 U.S. 37, 42). Treasury Regulations on Manufacturers Excise Taxes, Sec. 48.4141-2 (b), now in effect (Appendix F, p. A20, *infra*), make it plain that a radio receiving set named in section 4141 must have all the parts or accessories which are considered equipment "essential for the operation or appearance" of such articles. This obviously includes the common cabinet for housing all the other articles, which together, with it, make the complete "set."

In this connection, it might be added that there is a decided difference between the radio receiving set named in section 4141 and a loose aggregation of articles put together by a radio engineer or hobbyist and referred to by him as a radio receiving set merely by virtue of the fact that with it he is able to receive radio signals. The tax imposed by section 4141, after all, is a tax on manufacturers. The radio receiving sets and other articles enumerated therein are articles manufactured and sold by manufacturers of complete, finished products. Although, as indicated in the opinion of the court below (Appendix A, p. A5, *infra*), there was some testimony that the various articles manufactured and sold by the taxpayer could be "used with parts manufactured by other manufacturers in order to form radio receiving sets" and "that there are a number of ways in which the parts manufactured by Morrow can be combined in order to form radio

receiving sets," there was nothing in the record to show that these articles were ever so used by manufacturers of radio receiving sets for sale. In fact, the evidence seems to be quite to the contrary, inasmuch as the court made some point of the fact that the articles manufactured by Morrow were always sold as separate units and not as complete radio receiving sets.

Third. The opinion of the court below completely misstates the position of the taxpayer (Appendix A, p. A6, *infra*), in addition to its misinterpretation of the law and its neglect or refusal to be guided by administrative rulings. This was called to the attention of the court in a detailed petition for rehearing (R., Vol. II, p. 11-A; f. n. 1, *supra*). This, however, was denied by the court forthwith (Appendix C, pp. A10-A11, *infra.*) Since much of the court's opinion depends upon its statement that it does not feel that the statute "supports the position that Morrow advances," a misconception of this position must be viewed as a basic flaw in that opinion. This is a basic flaw in a decision of an important question of federal law which has not been, but should be, settled by this Court.

Contrary to the statement in the opinion of the court below (Appendix A, p. A6, *infra*), the taxpayer never "admitted that the radio parts are 'components' as the statute defines them." It would be impossible to do this and contend at the same time that they were not taxable components (as the opinion states the taxpayer did), since the statute only defines taxable components. An article named in section 4142 must be "suitable for use" before it qualifies as a component. If the article is not suitable for use, it is not a component and is not taxable. There is no question as to whether a component is taxable or non-taxable—all components as de-

fined in section 4142 are taxable—but only if both specifications of the definition are met.

In the opinion of the court below, (Appendix A, p. A6, *infra*), it is stated that "Morrow now argues that the parts manufactured are not suitable for use as component parts of a radio receiving set, for they cannot be joined together in a single cabinet in order to form a self-contained radio receiving set." This is another misconception of the position taken by the taxpayer. The taxpayer's argument was not that the articles in order to be considered radio components must necessarily be of such a character that they can be joined together in a single cabinet in order to form a self-contained radio receiving set. It was, rather, that the radio receiving sets, with which articles must be suitable for use in order to be classified as radio components, must be those subject to tax under section 4141 and that these are radio receiving sets which are manufactured and sold as single, complete, operating units.

But more than this, the question is not whether several articles sold by a manufacturer are taxable because all or some of them can be joined together in a certain manner. The test is whether each single article produced and sold is suitable for use with a radio receiving set, etc. This calls, again, for determination of whether the individual article is of a type commonly used with, or that possesses actual, practical commercial fitness for use with radio receiving sets named in section 4141.

At the time of the oral argument the court below was furnished a complete copy of Rev. Rul. 56-388, 1956-2 Cum. Bull. 808 (Appendix E, p. A17, *infra*), referred to *supra*, which indicates that a radio receiving set, taxable under section 4141, is one in which all of the

items necessary to a complete set are contained in a common cabinet. The court in its opinion, does not refer to this revenue ruling, but its statements just referred to would seem to be a thinly-veiled attempt to overrule it by indirection.

The misconception of the taxpayer's position and, thus, the basic misconception of the point in issue by the court below is continued up to the very end of its opinion. The court states (Appendix A, pp. A8-A9, *infra*) that there is nothing in the statute to suggest that the Congress intended to "redefine taxable components to mean only those components that may be used as parts of radio sets that are contained in a single cabinet." The court then concludes its opinion with the observation that: "This being the reasonable interpretation of the statute, we feel that the judgment of the district court must be affirmed." In the taxpayer's petition for rehearing (R., Vol. II, p. 11-A; f. n. 1, *supra*) the attention of the court below was called to the fact that this seemed to be at odds with the determination of the district court (R. 20) but that the court's opinion indicated no disagreement with the lower court. It was further pointed out that this left the law in a very confused state, since the appellate court did not go on to define in positive terms what is meant by the term "radio receiving sets" as used in section 4141 in relation to the question of suitability for use of an article named in section 4142.

It is submitted that review should be had by this Court before taxpayers are further burdened by unjust assessments of manufacturers excise tax based upon the defective and erroneous decision of the court below as a precedent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

No. 16857

Feb. 13, 1961

MORROW RADIO MANUFACTURING CO., a corporation, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the Judgment of the United States District Court for the District of Oregon.

Before: STEPHENS, HAMLEY and HAMLIN, Circuit Judges.

HAMLIN, Circuit Judge:

The Morrow Radio Manufacturing Company is an Oregon corporation engaged in the manufacture of radio equipment. During the period from October 1, 1955, through September 30, 1958, it manufactured and sold receivers, fixed-tuned receivers, power supply units, converters, and speakers.[1] Each article is in a separate cabinet and is sold primarily as amateur radio equipment.

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[1] The receivers are the *Falcon* (Exhibit 9-A) and the MBR-5 (Exhibit 9-B). Both are designed to receive transmissions on the five amateur bands, and in addition the *Falcon* is designed to receive transmissions on the standard broadcast band. Neither of these units is designed as a complete radio receiving set, and neither will operate unless connected to a power supply unit, an antenna and a speaker.

The fixed-tuned receiver is the FTR (Exhibit 9-C) and is designed to receive transmissions only on a single wave length. Like the receivers, it will not operate unless connected to a power supply unit, an antenna and a speaker.

The power supply units are the RAP 250-S (Exhibit 9-D) and the RVP (Exhibit 9-E). The RAP 250-S is designed to convert

Section 4141 of the Internal Revenue Code of 1954 imposes a tax upon certain radio equipment. Morrow's contention is that it does not impose any tax on the equipment which it manufactures. The statute reads as follows:

> There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof), a tax equivalent to 10 percent of the price for which so sold:
>
> Radio receiving sets.
> Automobile radio receiving sets.
> Television receiving sets.
> Automobile television receiving sets.
> Phonographs.
> Combinations of any of the foregoing.
> Radio and television components.
> Phonograph records.
>
> Except in the case of radio and television components and phonograph records, the tax imposed by this section shall apply only to articles of the entertainment type.[2]

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commercial voltages into voltages usable with radio receivers, and it also has a built-in speaker. The RVP converts voltages from automobile batteries into voltages usable with radio receivers. Neither one is a complete radio receiving apparatus.

The converters, namely, the 5BR, 5BR-2, 5BRLN and 5-BRF (the 5-BRF is in evidence as Exhibit 9-F), are designed for use with fixed-tuned receivers but also may be hooked into a standard broadcast receiver to make a combination shortwave and standard broadcast receiving set. It is incapable of producing sound by itself.

The speaker (Exhibit 9-G) is conceded to be a taxable component as it is capable of being used as a part of any radio receiving set.

[2] The last sentence of this section was enacted by the 84th Congress and became effective on Septemer 1, 1955 (Pub. L. No. 367, 84th Cong., 1st Sess., Aug. 11, 1955). The statute was restored to its original form by the Excise Tax Technical Changes Act of 1958, 72 Stat. 1275. The restoration became effective on January 1, 1959.

Section 4142 supplements Section 4141 by providing a definition of radio and television components:

> As used in section 4141, the term "radio and television components" means chassis, cabinets, tubes, speakers, amplifiers, power supply units, antennae of the "built-in" type, and phonograph mechanisms, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in section 4141 whether or not primarily adapted for such use.[3]

Morrow brought suit in the United States District Court for the District of Oregon in an effort to recover $1,658.03 in excise taxes allegedly erroneously paid to the government. The United States denied that the taxes were erroneously paid and in addition counterclaimed for $10,533.60 allegedly due and owing to the government in unpaid taxes. All of the amounts involved were excise taxes assessed under the provisions of § 4141. The district court found in favor of the government on both contentions, and it is from this decision that the appellant brings this appeal.[4]

The district court found that the articles in question were not of the "entertainment type;" that they were components as defined by the statute and therefore taxable; and that the amount of the tax had been collected from the purchasers so that under the provisions of § 6416 of the

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[3] This section was amended in 1958 to include phonograph record players within the term 'radio and television components.' The amendment was not effective until subsequent to the period covered by this case and has no bearing on the issues presented here.

[4] The opinion of the district judge is printed in *Morrow Radio Manufacturing Co.* v. *United States*, 179 F. Supp. 436 (D. Or. 1959).

Internal Revenue Code of 1954 Morrow is not entitled to recover the amounts from the government.[5]

In the first brief filed by Morrow in this appeal, it was contended that the units which Morrow manufactures are not sold as radio components, but rather that they are sold as complete radio receiving sets within the meaning of § 4141. If the contention is sound, the articles would not be subject to tax since the statute places a tax only on "components" when the articles manufactured are not of the "entertainment type."[6] The essence of this argument is that though none of the *units* is a complete radio receiving set, they are sold in groups that are complete radio receiving sets. The district judge found that this was not the case, and his conclusion is supported by the evidence. The record shows that the parts were not sold together in groups which formed radio receiving sets since (1) the purchasers from Morrow would order individual units rather than operating

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[5] The pertinent provisions of § 6416 relating to the recovery of taxes read as follows:

> No credit or refund of any overpayment of tax is imposed by section 4231(4), (5), or (6) (cabarets, etc.), chapter 31 (retailers taxes), or chapter 32 (manufacturers taxes) shall be allowed or made unless the person who paid the tax establishes, under regulations prescribed by the Secretary or his delegate, that he—
>
> (A) has not included the tax in the price of the article . . . and has not collected the amount of the tax from the person who purchased such article . . .
>
> (B) has repaid the amount of the tax . . . .

[6] The trial judge ruled that the parts manufactured by Morrow are not of the "entertainment type," and that ruling has not been attacked on this appeal.

sets;[7] (2) that certain of the parts manufactured by Morrow could be used with parts manufactured by other manufacturers in order to form radio receiving sets;[8] and (3) that there are a number of ways in which the parts manufactured by Morrow can be combined in order to form radio receiving sets.[9] Therefore the trial judge was correct in

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[7] On cross-examination Fred J. Hart, the general manager of Morrow, testified as follows:

> Q. Is it not true, Mr. Hart, that you do sell power supplies and receivers separately on many occasions? That is true from your company's point of view regardless of what the ultimate customer does?
>
> A. Yes, we sell them separately.

[8] There was testimony which indicates that the speaker and the converter can be used with equipment manufactured by other manufacturers without the necessity of modification and that the other parts manufactured by Morrow could be used with equipment manufactured by other manufacturers after some modifications had been made.

[9] The following testimony was given by Byron L. Youtz, one of appellant's experts:

> Q. Based on your examination of Exhibits 9-A through -G and looking at each of them separately, which of those come within your definition of radio receiving sets?
>
> A. Taken separately, really none of them do.
>
> Q. Which of those, if any, in combination would constitute a radio receiving set within your definition?
>
> A. Well, there are several possible orientations. I would say that the radio receivers of Type -A or -B plus one of the power supply units which would be -D or -E, plus a speaker. Now, I might say that there are several permutations among this group. That is, power supply unit Type -D has a speaker attached to it; therefore, I could use -A and -D or -B and -D and have a radio receiving set . . . .
>
> There is one more combination that would be possible, if you want this much detail. Type -F, which I think is the converter unit, plus Type -C, the receiver plus either of the power supplies, and again if we use power supply -D we do not need an external speaker. If we use power supply -E, we do need an external speaker.

holding that Morrow was a manufacturer of components within the meaning of §§ 4141 and 4142.

In the second brief that it filed on this appeal, Morrow abandoned this argument and admitted that the radio parts are "components" as the statute defines them. However, it is now contended that the components are not "taxable components" under the definition set forth in § 4142 of the statute. This section provides that in order to be taxable the components must be "suitable for use on or in connection with, or as component parts of, any of the articles enumerated in section 4141, whether or not primarily adapted for such use."[10] Morrow now argues that the parts manufactured are not suitable for use as component parts of a radio receiving set, for they can not be joined together in a single cabinet in order to form a self-contained radio receiving set. This argument presupposes that the radio receiving sets referred to by the statute must be contained in a single cabinet. We do not feel that an examination of the present statute and its predecessors supports the position that Morrow advances. In so deciding we accept the fact that the parts which Morrow manufactures can not be combined together within a single cabinet, or at least are not suitable to be so combined.[11]

The first statute to impose a tax on radio receiving apparatus was passed in 1932.[12] The text of that statute reads as follows:

> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax

---

[10] The only "article" in § 4141 which is referred to for the purposes of this case is "radio receiving sets."

[11] There was testimony at the trial that would indicate that the power supply unit becomes extremely hot when it is operating, and that it is not practical to combine it together with the other components in a single cabinet.

[12] Revenue Act of 1932, c. 209, 47 Stat. 169, § 607.

> equivalent to 5 per centum of the price for which so sold: Chassis, cabinets, tubes, reproducing units, power packs, and phonograph mechanisms, suitable for use in connection with or as part of radio receiving sets or combination radio and phonograph sets (including in each case parts or accessories therefor sold or in connection therewith or with the sale thereof), and records for phonographs. A sale of any two or more of the above articles shall, for the purpose of this section, be considered a sale of each separately.

The statute set forth above makes the tax applicable only to components, but neither the statute itself nor any regulations promulgated thereunder says that to be taxable the components must be capable of being used as parts of radio receiving sets contained within a single cabinet. The wording of the statute set out above corresponds very closely to the definition of components that is set out in § 4142 of the present statute.

In 1941 the taxing statute was amended and by expressly including radio receiving sets came closer to the form of the statute that is now under consideration:[13]

> There shall be imposed upon the following articles (including in each case, except in the case of musical instruments, parts or accessories thereof sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which sold:
>
> (a) Radio receiving sets, automobile radio receiving sets, combination radio and phonograph sets, and phonographs.
>
> (b) Chassis, cabinets, tubes, reproducing units, power packs, antennae of the "built-in" type, and phonograph mechanisms, which are suitable for use

[13] Revenue Act of 1941, c. 412, 55 Stat. 687, § 545.

on or in connection with, or as component parts of, any of the articles enumerated in subsection (a), whether or not primarily adapted for such use.

(c) Phonograph records.

(d) Musical instruments.

The major change that the 1941 act made was the addition of the term "radio receiving sets." Subsection (b), as quoted above, retains the tax on components that was imposed by the 1932 act, and the use of terms similar to those used in the 1932 act would indicate that the Congress intended that this subsection retain the same scope that it enjoyed under the 1932 act. There is no suggestion that the components must be suitable for use on or with or as parts of radio sets contained in a single cabinet.

Section 4142 of the present code defines taxable components in almost exactly the same language that was used in the 1941 act.[14] This would indicate that the Congress again intended to allow the same scope of taxation that had been encouraged by the earlier acts. There is nothing in the statute set forth in the 1954 code to suggest that the Congress intended to redefine taxable components to mean

---

[14] The 1941 act uses the following terms:

> Chassis, cabinets, tubes, reproducing units, power packs, antennae of the "built-in" type, and phonograph mechanisms, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a), whether or not primarily adapted for such use.

Section 4142 of the present code supplies the following definition of components:

> . . . chassis, cabinets, tubes, speakers, amplifiers, power supply units, antennae of the "built-in" type, and phonograph mechanisms, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in section 4141 whether or not primarily adapted for such use.

only those components that may be used as parts of radio sets that are contained in a single cabinet. There is nothing to suggest that the 1955 amendment to § 4141 was intended to effectuate such a change.[15]

This being the reasonable interpretation of the statute, we feel that the judgment of the district court must be affirmed.

In view of this holding it becomes unnecessary to decide whether Morrow is also barred from recovery by § 6416,[16] for we would reach that question only if we determined that the components manufactured by Morrow were not taxable under § 4141. The appellant contends that the district court was in error in holding that the burden of proof was upon Morrow to show that the burden of the tax had not been passed on to the purchaser of the radio equipment. We expressly refrain from passing on this issue.

The judgment of the district court is affirmed.

(Endorsed) Opinion Filed Feb. 13, 1961.

FRANK H. SCHMIDT, *Clerk*.

---

[15] See footnote 2.

[16] See footnote 5.

APPENDIX B

Judgment Below

UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

No. 16857

MORROW RADIO MANUFACTURING Co., a corporation, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the Judgment of the United States District Court for the District of Oregon

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Oregon

On consideration whereof, It is now ordered and adjudged by this Court, that the judgment of said
District Court
be and hereby is affirmed.

(Endorsed) Judgment

Filed and entered February 13, 1961

FRANK H. SCHMID, *Clerk*

APPENDIX C

Order Denying Rehearing

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from proceedings of: Monday, March 20, 1961

Before: Stephens, Hamley and Hamlin, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant, filed March 13,

1961 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

APPENDIX D

Statutes and Regulations Involved

1. Internal Revenue Code of 1954 (as amended by Sec. 2(a), Act of August 11, 1955, c. 805, 69 Stat. 689):

SEC. 4141. IMPOSITION OF TAX.

There is hereby imposed upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof), a tax equivalent to 10 percent of the price for which so sold:

Radio receiving sets.
Automobile radio receiving sets.
Television receiving sets.
Automobile television receiving sets.
Phonographs.
Combinations of any of the foregoing.
Radio and television components.
Phonograph records.

Except in the case of radio and television components and phonograph records, the tax imposed by this section shall apply only to articles of the entertainment type.
(26 U.S.C. 1958 ed., Sec. 4141.)

SEC. 4142. DEFINITION OF RADIO AND TELEVISION COMPONENT.

As used in section 4141 the term "radio and television components" means chassis, cabinets, tubes, speakers, amplifiers, power supply units, antennae of the "built-in" type, and phonograph mechanisms, which are suitable for use on or in connection with, or as component parts of any of the articles enumerated in section 4141, whether or not primarily adapted for such use.
(26 U.S.C. 1958 ed., Sec. 4142.)

2. Treasury Regulations on Manufacturers Excise Taxes (1954 Code):

Sec. 40.4141-1 Imposition of tax.

(a) *In general.* Section 4141 imposes a tax upon the sale by the manufacturer, producer, or importer of the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof):

(1) Radio receiving sets,
(2) Automobile radio receiving sets,
(3) Television receiving sets,
(4) Automobile television receiving sets,
(5) Phonographs,
(6) Combinations of any of the foregoing,
(7) Radio and television components, and
(8) Phonograph records.

In the case of a sale of a radio receiving set, automobile radio receiving set, television receiving set, automoble television receiving set, phonograph, or any combination of the foregoing, the tax attaches only if the article is of the entertainment type. The tax attaches upon the sale of phonograph records and radio and television components without regard to whether such articles are of the entertainment type. For a description of articles of the entertainment type, see paragraph (c) of this section. For provisions relating to (i) phonograph records and (ii) parts or accessories sold on or in connection with the sale of any article specified in subparagraphs (1) to (8) of this paragraph, see paragraphs (d) and (e), respectively, of this section. For definition of the term "radio and television components", and other provisions relating thereto, see section 4142 and § 40.4142-1.

(b) *Rate of tax.* Tax is imposed upon the sale of the above-mentioned taxable articles at the rate of 10 percent of the price for which sold. For definition of the term "price", see section 4216 and the regulations thereunder.

(c) *Articles of the entertainment type*—(1) *Radio receiving sets.* (i) Except as provided in either subdivision (ii) or (iii) of this subparagraph, a radio receiving set shall be considered of the entertainment type when the circuitry of the set is such that the set can receive radio transmssions on the Standard Commercial Amplitude Modulation (AM) or Frequency Modulation (FM) broadcast frequencies. It is immaterial whether the set is designed, intended, or sold for use in a private home or a commercial establishment, such as a restaurant, retail store, etc.

(ii) A radio receiving set shall be deemed not an article of the entertainment type when it contains all of the following items and such items are incorporated in the circuitry for a functional purpose:

(*a*) A band change mechanism permitting reception on two or more short wave bands;

(*b*) A variable beat frequency oscillator or other equipment designed to receive code transmission on Continuous Wave (CW) operated by means of a "front panel" control;

(*c*) A fine tuning or band spread or Vernier tuning mechanism that is calibrated with a subdividing logging scale;

(*d*) Provisions for earphones;

(*e*) A meter incorporating a moving coil or armature indicating relative field strength of the signal received; and

(*f*) A primary conversion oscillator, the frequency of which is controlled by a quartz crystal oscillator.

(iii) A radio receiving set of the type designed and manufactured primarily for the performance of communication, navigation, or detection services for industrial, commercial, marine, or governmental use generally may be considered not of the entertainment type. Services coming within the scope of the preceding sentence include, but are not limited to, safety, transportation, or disaster.

(2) *Television receiving sets.* A television receiving set shall be considered of the entertainment type when the circuitry of the set is such that it can receive television transmissions on the Standard Commercial Ultra High Frequency (UHF) or Very High Frequency (VHF) channels. It is immaterial whether the set is designed, intended, or sold for use in a private home or a commercial establishment, such as a restaurant, retail store, etc. A television receiving set which has incorporated in its circuitry for a functional purpose all the features described in subparagraph (1) (ii) of this paragraph is deemed not an article of the entertainment type. A television receiving set designed and manufactured primarily to perform any of the services listed in subparagraph (1) (iii) of this paragraph generally may be considered not of the entertainment type.

(3) *Phonographs.* A phonograph shall be considerd of the entertainment type if it is designed to reproduce sounds from phonograph records (as defined in paragraph (d) of this section). It is immaterial whether the phonograph is designed, intended, or sold for use in a private home or a commercial establishment, such as a restaurant, retail store, etc.

(d) *Phonograph records.* The term "phonograph records" means all disks, cylinders, or other articles, regardless of the material from which they are made, upon which are recorded music, speech, or other sounds which are capable of reproduction by means of a phonograph, re-

gardless of whether such records are or are not of the entertainment type. The term does not include tape or wire recordings.

(c) *Parts or accessories.* The tax attaches in respect of parts or accessories sold on or in connection with the sale of a radio receiving set, automobile radio receiving set, television receiving set, automobile television receiving set, phonograph, or any combination of the foregoing which is of the entertainment type (as defined in paragraph (c) of this section). The tax attaches in respect of parts or accessories sold on or in connection with the sale of phonograph records or radio and television components (see section 4142 and § 40.4142-1) without regard to whether such records or components are suitable for use on or in connection with an article of the entertainment type. Tax is not imposed in respect of parts or accessories sold separately by the manufacturer, producer, or importer, that is, not sold on or in connection with the sale of any radio or television receiving set, phonograph, any combination of the foregoing, or any phonograph record, or radio or television component.

Sec. 40.4142-1 Radio and television components.

(a) *In general.* The term "radio and television components" means chassis, cabinets, tubes, speakers, amplifiers, power supply units, antennae of the "built-in" type, and phonograph mechanisms. However, an article specified in the preceding sentence constitutes a radio or television component, for purposes of the tax imposed by section 4141, if it is suitable for use on or in connection with, or as a component part of, any radio receiving set, automobile radio receiving set, television receiving set, automobile television receiving set, phonograph, or a combination of the foregoing, without regard to whether such set, phonograph, or combination is of the entertainment type.

(b) *Suitable for use defined.* Radio or television components are suitable for use, within the meaning of section 4142 and paragraph (a) of this section, if the components are commonly used with any of the articles enumerated in section 4141 and paragraphs (a) (1) to (6) of § 40.4141-1 or if the components possess actual, practical commercial fitness for such use. It is immaterial whether the radio or television component is primarily adapted for such use.

(c) *Definitions*—(1) *Chassis.* The term "chassis" includes any assembly of parts into circuits for the reception and conversion of radio or television signals into impulses suitable for the reproduction of (i) sound by a radio receiving set, or (ii) a picture, either with or without its associated sound, by a television receiving set.

(2) *Cabinets.* The term "cabinets" includes containers suitable for housing a chassis for any radio or television receiving set, phonograph, or any combination of the foregoing.

(3) *Tubes.* The term "tubes" includes tubes of all types suitable for use on or in connection with, or as component parts of, any radio or television receiving set, phonograph, or any combination of the foregoing.

(4) *Speakers.* The term "speakers" includes all devices for use in converting electrical impulses to sound whether or not equipped with coupling units (but not including earphones) which are suitable for use on or in connection with, or as component parts of, any radio or television receiving set, phonograph, or any combination of the foregoing.

(5) *Amplifiers.* The term "amplifiers" includes all apparatus for the amplification of audio frequency or video frequency impulses which are suitable for use on or in connection with, or as component parts of, any radio or television receiving set, phonograph, or any combination of the foregoing.

(6) *Power supply units.* The term "power supply units" includes all devices which are suitable for use on or in connection with, or as component parts of, any radio or television receiving set, phonograph, or any combination of the foregoing and which convert electric current of ordinary commercial and domestic voltages into electric current voltages suitable for operating any such articles.

(7) *Antennae of the "built-in" type.* The term "antennae of the 'built-in' type" includes all types of aerials designed to be contained in any radio or television receiving set, or combination of the foregoing.

(8) *Phonograph mechanism.* A "phonograph mechanism" is a combination of a motor, pick-up arm, and turntable. A pick-up cartridge or record changer sold on or in connection with a phonograph mechanism is a part or accessory for the phonograph mechanism.

APPENDIX E

Revenue Ruling 56-388

(1956-2 Cumulative Bulletin 808)

Applicability of manufacturers excise tax, imposed by section 4141 of the Internal Revenue Code of 1954, to the sale, by a distributor, of certain units of radio, television or phonograph equipment in a group but without a common cabinet.

Advice has been requested concerning the applicability of the manufacturers excise tax to certain sales, by a distributor, of record players, amplifiers, speakers, and radio and television tuners, for installation in homes where the cabinets are already a part of the house design or furniture.

The above-named articles are designed to be sold separately, but in order to serve their purposes they are so

constructed that they may be plugged into one another. Most of the articles have individual housings or cabinets. Any which are themselves taxable are purchased by the distributor on a tax-paid basis. They are sold by the distributor in the same packages in which they were received from the manufacturer, without further processing or assembling. The articles may be sold as separate units, or they may be sold in groups, such as (1) a record player, amplifier and speaker, (2) a record player, amplifier and radio tuner, or (3) a record player, amplifier, radio tuner and television tuner. Such a group sale does not include the sale of a common cabinet into which the units may be incorporated.

Section 4141 of the Internal Revenue Code of 1954 imposes a tax upon the sale by the manufacturer of certain articles, including radio receiving sets, television receiving sets, phonographs, and combinations of any of the foregoing. By virtue of the amendment of that section by Public Law 367, 84th Congress, 69 Stat. 689, C.B. 1955-2, 768, effective September 1, 1955, the tax applies to the sale by the manufacturer of these articles *only if they are of the entertainment type.*

Prior to September 1, 1955, section 4220 of the Code provided that no manufacturers excise tax shall be imposed with respect to the sale of any article for use by the vendee as material in the manufacture or production of, or as a component part of, an article subject to the tax. Under the law as amended by Public Law 367, an exemption from the manufacturers excise tax is provided for certain taxable components, including radio or television components, used or sold on and after September 1, 1955, for use as material in the manufacture or production of, or as a component part of, any article, whether or not such article is subject to the manufacturers excise tax. The manufacturer or producer to whom an article is sold or resold tax-free under these provisions shall be considered the manufacturer or producer of such article.

Section 316.4 of Regulations 46, made applicable to the 1954 Code by Treasury Decision 6091, C.B. 1954-2, 47, provides that the term "manufacturer" includes a person who produces a taxable article by combining or assembling two or more articles, and further provides that a manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax.

It is held that a distributor who purchaser separate units, such as a record player, amplifier, speaker, and tuner, and resells them without a common cabinet is not a manufacturer of a taxable radio or television receiving set or phonograph and is not subject to the tax imposed by section 4141 of the Code, regardless of whether the articles are sold separately or in groups, and regardless of whether they are interconnected and installed in the purchaser's home. However, anyone first associating and selling a common cabinet with a group of units which collectively may be regarded as constituting a radio receiving set, a television receiving set, a phonograph, or a combination of any of the foregoing, is a manufacturer within the meaning of the law and is liable for the tax on the sale of any such group of articles either in a knockdown condition or assembled in the cabinet. Such a person would be entitled, under the provisions of section 6416(b)(3) of the Code and section 316.204 of Regulations 46, to a credit in the amount of tax already paid by the manufacturers of any of the components which were themselves subject to tax. Prior to September 1, 1955, the credit is allowable under section 6416(b)(3)(A). With respect to components used on and after that date for further manufacturer, the credit is allowable under section 6416(b)(3)(B), as amended.

APPENDIX F

Treasury Regulations on Manufacturers Excise Taxes (effective January 1, 1959):

Sec. 48.4141-2 Parts or Accessories.

(a) *In general.* The tax attaches in respect of parts or accessories for articles specified in section 4141 and paragraph (a) of § 48.4141-1 sold on or in connection with the sale thereof at the rate applicable to the sale of the basic articles. The tax attaches in such case whether or not the parts or accessories are billed separately. On the other hand, no tax attaches in respect of parts or accessories for articles specified in section 4141 and paragraph (a) of § 48.4141-1 which are sold otherwise than on or in connection with such articles or with the sale thereof.

(b) *Essential equipment.* If taxable articles are sold by the manufacturer, producer, or importer thereof without parts or accessories which are considered equipment essential for the operation or appearance of such articles, the sale of such parts or accessories will be considered, in the absence of evidence to the contrary, to have been made in connection with the sale of the basic article even though they are shipped separately at the same time or on a different date.

Sec. 48.4142-1 Radio and Television Components.

(a) *In general.* The term "radio and television components" means chassis, cabinets, tubes, speakers, amplifiers, power supply units, antennae of the "built-in" type, phonograph mechanisms, and phonograph record-players, which are suitable for use on or in connection with, or as a component part of, any radio or television receiving set, phonograph, or combination of any of the foregoing.

(b) *Suitable for use defined.* An item is suitable for use, within the meaning of section 4142 and paragraph (a) of this section, if it is commonly used with any of the articles enumerated in section 4141 and paragraph (a) (1) through (6) of § 48.4141-1 or if it possesses actual, practical commercial fitness for such use. It is immaterial whether the item is primarily adapted for such use

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No. 156

In the Supreme Court of the United States

OCTOBER TERM, 1961

MORROW RADIO MANUFACTURING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 19–22) is reported at 179 F. Supp. 436. The opinion of the court of appeals (Pet. A1–A9) is reported at 287 F. 2d 502.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1961. (Pet. A10.) Successive petitions for rehearing were denied on March 20, 1961 (Pet. A10–A11), and on March 30, 1961 (R., Vol. II, 15). The petition for a writ of certiorari was filed on June 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain items of radio equipment manufactured and sold by the taxpayer are "radio * * * components" subject to the manufacturers' excise tax under Sections 4141 and 4142 of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

Sections 4141 and 4142 of the Internal Revenue Code of 1954 (26 U.S.C.) and §§ 40.4141–1 and 40.4142–1 of the Treasury Regulations on Manufacturers Excise Taxes (1954 Code) are set forth at pp. A11–A17 of the petition.

STATEMENT

Petitioner is engaged in the manufacture and sale of radio receivers, converters (tuners), power supply units, and speakers. The equipment is designed primarily for use by amateur radio operators. Each unit is manufactured and sold in a separate cabinet and must be combined with one or more of the other units (or those of other manufacturers) and an antenna to operate as a complete radio receiving set (Pet. A1–A2).

This is a suit for refund of $1,658.03 paid by petitioner as manufacturers' excise taxes on articles sold during the period October 1, 1955, to September 30, 1958. The United States counterclaimed for $10,533.60 in additional taxes for the same period. The district court held that all of the articles involved were "radio * * * components" subject to the 10 percent excise tax imposed by §§ 4141 and 4142 of the

Internal Revenue Code of 1954 (R. 19–29). The court of appeals affirmed (Pet. A1–A9).

ARGUMENT

Section 4141 of the Code (Pet. A11) imposes a tax on the sale by the manufacturer of "Radio receiving sets" and of "Radio and television components."[1] Section 4142 defines "components" to mean "chassis, * * * speakers, * * * [and] power supply units * * * which are suitable for use on or in connection with, or as component parts of any of the articles enumerated in section 4141 [*i.e.*, "Radio receiving sets"], whether or not primarily adapted for such use." Petitioner contends (1) that its receivers and converters are not properly classifiable as "chassis" and hence are not enumerated in § 4142; and (2) that, except for the speakers, none of its articles are "suitable for use * * * as component parts of" the relevant article, "Radio receiving sets." Neither contention is sound.

1. The regulations define "chassis" as including "any assembly of parts into circuits for the reception and conversion of radio * * * signals into impulses suitable for the reproduction of * * * sound by a

[1] The tax on sets, but not on components, is limited to those "of the entertainment type" (§ 4141). The taxpayer has not sought review of the holding below that none of its units constituted "sets", which would be exempt from tax because not of the entertainment type.

References are to the statute as in effect for the years in suit. The Excise Tax Technical Changes Act of 1958, § 113, 72 Stat. 1275, effective January 1, 1959, deleted the "entertainment type" limitation in § 4141 and added, in a new § 4143, a specific exemption for certain kinds of communication equipment and components.

radio receiving set * * *." Treasury Regulations on Manufacturers Excise Taxes (1954 Code) § 40.4142–1(c)(1) (Pet. A16).[2] The evidence establishes that petitioner's receiver and converter perform precisely that function (Pet. A1–A2; R. 26–27, 92–93, 95, 98, 100, 119–120, 122). Hence they qualify as "chassis" within the meaning of § 4142.

2. Admittedly petitioner's articles have use only when combined to form a "radio receiving set" in the generic sense. The contention that they do not meet the "suitable for use" test of § 4142 is premised, not on the function of the articles, but upon the narrow definition petitioner would give to "Radio receiving sets" as that term is used in § 4141—namely, as including only sets that are "manufactured and sold as single, complete, operating units" (Pet. 14) and excluding sets consisting of separately purchased components assembled into an operating unit by the purchaser.[3] There is no basis in either the text or the history of the statute for giving "radio receiving sets" anything other than its ordinary meaning—*i.e.*, an aggregation of parts capable of receiving radio signals and converting them into sound. Petitioner's reliance on Rev. Rul. 56–388, 1956–2 Cum. Bull. 808 (Pet. A17–A19) is misplaced. That ruling held that a distributor who purchased radio and phonograph components from manufacturers and resold them in their

[2] For similarly broad definitions, dating back to 1932, see Treas. Reg. 46 (1932 ed.), Art. 45, and its amplifying ruling, S.T. 629, 1933–1 Cum. Bull. 398, 399; Treas. Reg. 46 (1940 ed.), § 316.61.

[3] Starting with that premise, petitioner then contends that its units are not of the type generally used in pre-assembled sets.

original packages to customers for home assembly and installation was not, simply because the units were sold in groups, "a manufacturer of a taxable radio * * * receiving set" and was therefore not subject to the tax imposed by § 4141. Patently, the basis of the ruling was not that the units, when assembled, would not constitute a "radio receiving set," but only that the distributor, not having assembled them, was not a "manufacturer" of a set.

CONCLUSION

The decision below is correct; there is no conflict; and the question is of no general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1961.

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OCTOBER TERM, 1961

No. 156

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Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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H. R. Rep. 1040, 77th Cong., 1st Sess., 1941-2 Cum. Bull. 439 5

Hearings Before the Committee on Finance, 72nd Cong., 1st Sess., 1028-1044 (1932) 6
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REGULATIONS:

Treasury Regulations on Manufacturers Excise Taxes (1954 Code):
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MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 156

MORROW RADIO MANUFACTURING CO., a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The Government's brief in opposition has served to sharpen the principal question which petitioner asks the Court to review. Both parties agree that the tax imposed by section 4141 of the Internal Revenue Code of 1954 on the sale of radio and television components is only applicable when the chassis and other articles

named in section 4142 are "suitable for use" with, in this case, a "radio receiving set." The parties disagree as to the meaning of "radio receiving set." The Government argues that "radio receiving set" is used in a "generic" sense to describe "an aggregation of parts capable of receiving radio signals and converting them into sound." (Govt. Br. 4) Petitioner asserts that a "radio receiving set" named in section 4141 was intended by Congress to mean, and does mean, a "complete" radio receiving set manufactured and sold as one integrated unit.

This reply brief is impelled by (1) the Government's failure to recognize the importance of having the issue set forth above resolved by this Court, and (2) the Government's misstatement as to the presence of guiding legislative history.

1.

In its petition for a writ of certiorari, petitioner set forth cogent reasons why the Court should exercise its power of review. Petitioner emphasized the importance of the federal question presented "which has not been, but should be settled by this Court." See Rule 19, Rules of the Supreme Court of the United States. Petitioner pointed out that the court of appeals has rendered an erroneous decision in an area of excise tax law governing revenue of $17 million annually, and that the case before the Court is the only decided case rendered in this important field in the almost thirty years of its existence. (Pet. 9).

Petitioner also emphasized the peculiar retroactive effect of excise tax interpretations. (Pet. 10) Congress recognized this peculiar status when it enacted

the predecessor to section 4141 in 1932. The report of the House Committee on Ways and Means alluded to this problem as follows:

> "Obviously, the decisions [of an interpreting body] will require time. The imposition, retroactively, of tax liabilities will follow. Businesses will be ruined. And the tax will become unbearable." H.R. Rep. No. 708, 72nd Cong., 1st Sess., 1939-1 (Part 2) Cum. Bull. 481.

This unique effect of excise tax decisions upon manufacturers of the items taxed is, by itself, a sufficient reason for the Court to review the important question of federal tax law presented. But manufacturers of radio and television components are not the only ones affected. If an erroneous decision of a court of appeals such as this is allowed to stand unreviewed, manufacturers may be forced to add 10% to their sales price in order to provide for the asserted applicability of the tax. The result is that the public, in the form of individual consumers, needlessly bears the burden of an inflated sales price.

What is the answer of the Government to these and the other compelling reasons advanced by petitioner for Supreme Court review? Its answer, with the exception of a summary remark in its "Conclusions" (Govt. Br. 5), is to argue the merits of the legal question only. Compare Rule 19, *supra*. Thus the reasons for review urged by the petitioner stand uncontradicted.

2.

In the area touched upon by the Government in its brief in opposition, misstatements are made. One such

misstatement deserves correction now. The Government argues that petitioner would define "radio receiving sets" as follows:

> "as including only sets that are 'manufactured and sold as single, complete, operating units' (Pet. 14) and excluding sets consisting of separately purchased components assembled into an operating unit by the purchaser."

The Government continues:

> "There is no basis in either the text or the history of the statute for giving 'radio receiving sets' anything other than its ordinary meaning—*i.e.*, an aggregation of parts capable of receiving radio signals and converting them into sound." (Govt. Br. 4)

In 1932 Congress used the term "radio receiving sets" in enacting section 607 of the Revenue Act of 1932 (c. 209, 47 Stat. 169). This section, although entitled "Tax on Radio Receiving Sets, Etc.," actually did not include radio receiving sets but only imposed a tax upon the sale of enumerated articles if they were "suitable for use in connection with or as part of radio receiving sets . . ."

In 1939, *the provisions of* section 607 of the Revenue Act of 1932, here pertinent, were incorporated into the Internal Revenue Code of 1939 as section 3404. That section was in turn amended in 1941[1] to include the tax on the sale of radio receiving sets as such, and to define components as chassis and other articles specifically named which "are suitable for use" with the newly included radio receiving sets, etc. Congress, thus, in order to raise additional reve-

[1] Revenue Act of 1941, c. 412, 55 Stat. 687.

nue, continued the existing tax in effect, and in addition, placed a tax on the sale of radio receiving sets. The committee report of the House Ways and Means Committee on the 1941 amendment, is particularly pertinent. That report states:

> "*Radios, phonographs, phonograph records, and musical instruments.*—Under existing law the tax applies only to parts and accessories for radio receiving sets and combination radio and phonograph sets. This category has been expanded to include *completed radio sets*, phonographs, phonograph records, automobile radios, and musical instruments." (Emphasis added) H.R. Rep. 1040, 77th Cong., 1st Sess., 1941-2 Cum. Bull. 439.

Thus Congress, having considered the imposition of a tax in 1932 upon the sale of radio receiving sets, in reconsidering such a tax in 1941 went back and used the same phrase as that employed in section 607 of the Revenue Act of 1932, and defined it as a "completed" radio receiving set. This phrase has been used in all subsequent revenue legislation affecting the same subject without the slightest indication of any change in meaning.

In this context the meaning of the phrase "radio receiving set" becomes crystal clear. The House committee in 1941 was in a sense looking both backward and forward when it defined that phrase. A radio receiving set was and is a "completed" radio receiving set. And since the tax imposed by section 4141 is one upon the sale by manufacturers, Congress by including radio receiving sets as one of the articles enumerated therein meant a radio receiving set manufactured and sold as one complete integrated unit. This is the "radio receiving set" with which an article named in section

4142 must be "suitable for use" in order to be classed as a radio and television component.

The Committee's understanding of the phrase in question is, after all, only confirmatory of common parlance and ordinary speech. The ordinary American says that he is going to buy "a radio" when he intends to purchase a "radio receiving set." What is a "radio," in the everyday sense, but a single integrated unit manufactured and sold as such? Advertisements—which both reflect and create ordinary parlance—do not, for example, present some loose "aggregation of parts" as a "radio" or "radio receiving set." It is revealing to see that Congress, too, was accustomed to the use of the terms "radio" and "radio receiving set" interchangeably. See Hearings Before the Committee on Ways and Means, 72nd Cong., 1st Sess., 717-728 (1932); and Hearings Before the Committee on Finance, 72nd Cong., 1st Sess., 1028-1044 (1932).

Thus, contrary to the Government's assertion, the legislative history of the sections under consideration combines with common knowledge to support petitioner's position.

In addition, the Treasury itself has interpreted the statute in the manner proposed by petitioner. Petitioner has referred to Rev. Rul. 56-388, 1956-2 Cum. Bull. 808 (Pet. 7, 11, 14, A17-18). Although the Government attempts to rebut petitioner's interpretation of this ruling (Govt. Br. 4-5), no attempt is made to refute the clear implication of Sec. 48.4141-2, Treasury Regulations on Manufacturers Excise Taxes, that a radio receiving set is a complete unit which includes the common cabinet for housing all the other articles. (Pet. 12.)

CONCLUSION

The Government has failed to show any valid reason for the refusal of certiorari. It is respectfully submitted that the petition for a writ of certiorari should be granted.

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